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Public Prosecutor v Dato' Seri Anwar bin Ibrahim

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–21–02 OF 2014
SURIYADI, AHMAD MAAROP, HASAN LAH, ABU SAMAH AND RAMLY ALI FCJJ
31 MARCH 2014

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Criminal Procedure — Appeal — Evidence — Fresh or additional evidence — Application to recall witness to adduce additional evidence — Whether additional evidence available at trial — Whether evidence relevant, necessary and expedient in the interest of justice — Whether requirements in R v Parks [1961] 3 All ER 633 satisfied — Whether court should exercise discretion to receive additional evidence — Courts of Judicature Act 1964 s 61

D

Criminal Procedure — Appeal — Procedures for, principles governing — Whether appeal to Federal Court competent — Appeal against decision of Court of Appeal in striking out interlocutory appeal — Whether appeal competent pursuant to s 87 of the Courts of Judicature Act 1964 — Whether matter originated from Court of Appeal and not from High Court thereby rendering decision unappealable — Courts of Judicature Act 1964 s 87

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In Criminal Trial No 45–9 of 2009 Dato' Seri Anwar bin Ibrahim ('the respondent') was charged at the High Court for committing carnal intercourse against the order of nature. The respondent was acquitted. However, the acquittal was set aside by the Court of Appeal upon the public prosecutor's appeal against the acquittal. The respondent's appeal ('the acquittal appeal') against that decision to the Federal Court was pending. Earlier, pending the disposal of the appeal at the Court of Appeal, the respondent had taken the anticipatory action of filing a motion in the Court of Appeal (encl 62(a)) for leave pursuant to s 61 of the Courts of Judicature Act 1964 ('CJA'), to recall PW25 (the investigating officer). The relevant evidence sought to be introduced was in relation to the rejection of PW25's petition for admission to the Malaysian Bar. Enclosure 62(a) was dismissed by the Court of Appeal on the grounds that the respondent had failed to satisfy two out of the four requirements laid down in *R v Parks* [1961] 3 All ER 633 and the prerequisites of s 61 of the CJA. Aggrieved, the respondent filed an appeal against that decision (the interlocutory appeal). Before the interlocutory appeal could be heard, the applicant filed encl 3(a) to strike out the interlocutory appeal. The Court of Appeal allowed encl 3(a) and hence the present appeal against the decision to allow encl 3(a). The applicant argued that the interlocutory appeal

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must be struck out on the basis that the Court of Appeal's ruling over encl 62 (a) was an interlocutory decision and therefore was non-appealable as it did not fall within the meaning of 'decision' pursuant to s 3 of the CJA. The respondent submitted that the issue in encl 62(a) originated from the Court of Appeal and not from the High Court. The respondent claimed that s 87 applies only to decisions of the Court of Appeal in respect of decisions from the High Court in its original jurisdiction. As enclosure 62(a) was decided for the first time in the Court of Appeal, the respondent claimed that s 87 was inapplicable.

Held:

(1) The Suhakam report was readily available by 23 April 2010 whilst the trial of the respondent at the High Court was after that date. The additional evidence to be admitted was available during the trial. With some diligence and leg work PW25 could have been recalled to adduce additional evidence at the High Court (see para 13).

(2) Section 61 requires a subjective deliberation of the Court of Appeal's mind, whether the additional evidence would be necessary, and thereafter decide whether such additional evidence would be taken down by itself or by the trial court. Necessary means that unless additional evidence is admitted, a miscarriage of justice would result or its reception is expedient in the interest of justice (see para 14); *Khamis v Public Prosecutor* [1971] 2 MLJ 267 and *Phung Geok Hoay v Pendakwa Raya* [2013] 3 MLJ 728 referred.

(3) Section 87 of the CJA was wide enough to include the present matter ie the prayers in encl 3. The matter appealed against was criminal in nature, the decision to be dealt by the Federal Court emanated from the Court of Appeal in its appellate jurisdiction, and the matter (not decision) was decided earlier by the High Court in its original jurisdiction. Section 87 speaks of matter, rather than decision, a word thus wide enough to include a striking out application. With s 87 of the CJA being applicable, the denial by the Court of Appeal to recall PW25 to adduce further evidence was not a final order within the context of s 3 of the CJA (see paras 17 & 19).

(4) The appeal filed against the ruling of the Court of Appeal disallowing the prayers of encl 62(a) was thus incompetent and thus non-appealable. Enclosure 3(a) was thus allowed and the interlocutory appeal was struck out in limine (see para 20).

[Bahasa Malaysia summary

Dalam Perbicaraan Jenayah No 45–9 Tahun 2009 Dato' Seri Anwar bin Ibrahim ('responden') telah dituduh di Mahkamah Tinggi kerana melakukan hubungan seks luar tabi'i. Responden telah dibebaskan. Walau bagaimanapun, pembebasan itu telah diketepikan oleh Mahkamah Rayuan selepas rayuan

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pendakwa raya terhadap pembebasan itu. Rayuan responden ('rayuan pembebasan') terhadap keputusan tersebut ke Mahkamah Persekutuan masih belum selesai. Sebelum ini, sementara menunggu selesai rayuan di Mahkamah Rayuan, responden telah mengambil tindakan terlebih dahulu memfailkan usul di Mahkamah Rayuan (lampiran 62(a)) untuk kebenaran menurut s 61 Akta Mahkamah Kehakiman 1964 ('AMK'), untuk memanggil semula PW25 (pegawai penyiasat). Keterangan berkaitan yang ingin diperkenalkan adalah berkenaan penolakan petisyen PW25 untuk kemasukan ke Badan Peguam Malaysia. Lampiran 62(a) telah ditolak oleh Mahkamah Rayuan atas alasan bahawa responden telah gagal memenuhi dua daripada empat keperluan yang dinyatakan dalam kes *R v Parks* [1961] 3 All ER 633 dan prasyarat s 61 AMK. Terkilan, responden telah memfailkan rayuan terhadap keputusan tersebut (rayuan interlokutori). Sebelum rayuan interlokutori dapat didengar, pemohon telah memfailkan lampiran 3(a) untuk membatalkan rayuan interlokutori itu. Mahkamah Rayuan telah membenarkan lampiran 3(a) dan justeru rayuan ini terhadap keputusan itu untuk membenarkan lampiran 3(a). Pemohon berhujah bahawa rayuan interlokutori perlu dibatalkan berdasarkan keputusan Mahkamah Rayuan yang lampiran 62(a) adalah keputusan interlokutori dan oleh itu tidak boleh dirayu kerana ia tidak terangkum dalam maksud 'decision' menurut s 3 AMK. Responden berhujah bahawa isu dalam lampiran 62(a) berasal dari Mahkamah Rayuan dan bukan dari Mahkamah Tinggi. Responden mendakwa bahawa s 87 hanya terpakai kepada keputusan-keputusan Mahkamah Rayuan berhubung keputusan-keputusan dari Mahkamah Tinggi. Responden mendakwa s 87 hanya terpakai kepada keputusan-keputusan Mahkamah Rayuan berhubung keputusan-keputusan dari Mahkamah Tinggi dalam bidang kuasa asalnya. Oleh kerana lampiran 62(a) telah diputuskan untuk pertama kali di Mahkamah Rayuan, responden mendakwa bahawa s 87 adalah tidak terpakai.

Diputuskan:

(1) Laporan Suhakam tersedia diperolehi pada 23 April 2010 manakala perbicaraan responden di Mahkamah Tinggi adalah selepas tarikh itu. Keterangan tambahan untuk diterima masuk sedia ada semasa perbicaraan. Dengan sedikit usaha PW25 mungkin dapat dipanggil balik untuk mengemukakan keterangan tambahan di Mahkamah Tinggi (lihat perenggan 13).

(2) Seksyen 61 memerlukan pertimbangan subjektif Mahkamah Rayuan, sama ada keterangan tambahan itu adalah perlu, dan kemudian memutuskan sama ada keterangan tambahan itu boleh diterima dengan sendirinya atau oleh mahkamah perbicaraan. Perlu bermaksud kecuali keterangan tambahan diterima, pelaksanaan yang tidak adil akan dilakukan atau penerimaannya disegerakan demi kepentingan keadilan (lihat perenggan 14); *Khamis v Public Prosecutor* [1971] 2 MLJ 267 dan *Phung Geok Hoay lwn Pendakwa Raya* [2013] 3 MLJ 728 dirujuk.

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(3) Seksyen 87 AMK adalah luas untuk meliputi perkara ini, iaitu permohonan dalam lampiran 3. Perkara yang dirayu adalah bersifat jenayah, keputusan untuk dikendalikan oleh Mahkamah Persekutuan berpunca dari Mahkamah Rayuan dalam bidang kuasa rayuannya, dan perkara itu (bukan keputusan) telah diputuskan terlebih dahulu oleh Mahkamah Tinggi dalam bidang kuasa asalnya. Seksyen 87 adalah berkaitan perkara, dan bukan keputusan, perkataan yang cukup luas untuk meliputi permohonan pembatalan. Dengan s 87 AMK yang boleh terpakai, penafian oleh Mahkamah Rayuan untuk memanggil semula PW25 untuk mengemukakan keterangan selanjutnya bukan perintah muktamad dalam konteks s 3 AMK (lihat perenggan 17 & 19).

(4) Rayuan yang difailkan terhadap keputusan Mahkamah Rayuan tidak membenarkan permohonan-permohonan lampiran 62(a) dengan itu tidak kompeten dan tidak boleh dirayu. Lampiran 3(a) oleh itu dibenarkan dan rayuan interlokutori dibatalkan *in limine* (lihat perenggan 20).]

Notes

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 529–579.

For cases on procedure for principle governing, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 815–834.

Cases referred to

Che Din bin Ahmad v PP [1976] 1 MLJ 289 (refd)
Khamis v PP [1971] 2 MLJ 267 (refd)
Murugayah v PP [2004] 2 MLJ 545, CA (refd)
Phung Geok Hoay lwn Pendakwa Raya [2013] 3 MLJ 728, CA (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436, FC (refd)
R v Parks [1961] 3 All ER 633, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50, 51, 61, 87
Penal Code s 377B

Appeal from: Criminal Appeal No W-05–19–01 of 2012 (Court of Appeal, Putrajaya)

Muhammad Shafee bin Muhamad Abdullah (Mohamad Hanafiah bin Zakaria and Noorin bt Badaruddin with him) (Attorney General's Chambers) for the appellant.

Karpal Singh (Ram Karpal Singh, Sangeet Kaur Deo, Zaleha Al Hayat Jeremy and Vinesh Anthony with him) (Karpal Singh & Co) for the respondent.

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Suriyadi FCJ (delivering judgment of the court):

[1] In Criminal Trial No 45–9 of 2009 Dato' Seri Anwar bin Ibrahim ('the respondent') was charged at the Kuala Lumpur High Court for committing carnal intercourse against the order of nature with one Mohd Saiful Bukhari bin Azlan, an offence punishable under s 377B of the Penal Code. The respondent was acquitted whereupon the public prosecutor lodged an appeal against that acquittal ('acquittal appeal'). The acquittal was later set aside by the Court of Appeal on 7 March 2014 and the respondent was found guilty of the preferred charge; the appeal filed by the respondent is pending before the Federal Court.

[2] Pending the disposal of the acquittal appeal at the Court of Appeal, and decided eventually on 7 March 2014, the respondent had taken the anticipatory action of filing a motion in the Court of Appeal (encl 62(a)) for leave pursuant to s 61 of the Courts of Judicature Act 1964 ('CJA'), to recall one Judy Blacious s/o A F Pereira (PW25), the investigating officer in the above case of Perbicaraan Jenayah No 45–9 Tahun 2009. Section 61 of the CJA reads as follows:

> In dealing with any appeal in a criminal case the Court of Appeal may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial court.

[3] The relevant evidence was in relation to the rejection of PW25's petition of admission to the Bar of the High Court, Kuala Lumpur. The presiding High Court judge, Zaleha Yusuf J, on 10 January 2014 had rejected the petition on the ground that PW25 was not a fit and proper person to be admitted to the Bar based on the finding of an inquiry held by SUHAKAM ('Suhakam report'). It was a public inquiry into the arrest and detention of five lawyers of the Kuala Lumpur Legal Aid Centre on 7 May 2009.

[4] Enclosure 62(a) was dismissed by the Court of Appeal on 12 February 2014 as the respondent had failed to cumulatively satisfy two out of the four requirements laid down in *R v Parks* [1961] 3 All ER 633 and the prerequisites of s 61 of the CJA. The four requirements of the latter case are:

(a) the evidence that it sought to call must be evidence which was not available at the trial;

(b) the evidence must be relevant to the issues;

(c) the evidence is credible in the sense that it is well capable of belief; and

(d) that evidence would have created a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

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[5] The Court of Appeal held the view that as the respondent had failed to satisfy the first two requirements there was thus no further need to consider the other two requirements out of the four. Aggrieved, the respondent filed an appeal on 13 February 2014 (the interlocutory appeal). Before the interlocutory appeal could be heard the applicant filed encl 3(a) to strike it out. This application was served on the respondent. At the end of the hearing on 4 March 2014 we allowed encl 3(a)'s application and accordingly struck out the respondent's interlocutory appeal (see *Halsbury's Laws of England* (4th Ed) para 506 at 240 as to the explanation of interlocutory; *Public Prosecutor v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436). We now supply our reasons for striking it out.

THE ARGUMENTS RAISED BY BOTH PARTIES BEFORE US

[6] The applicant initially raised four grounds in the affidavit-in-support of this striking out application, and they were:

(a) the decision of the Court of Appeal that led to the filing of the interlocutory appeal was non-appealable;

(b) the respondent failed to satisfy the requirements of s 61 of the CJA;

(c) the recall of PW25 was unnecessary; and

(d) the substantive appeal was doomed to fail.

[7] Despite the above manifold grounds the applicant merely relied on the ground that the interlocutory appeal must be struck out on the basis that the Court of Appeal's ruling over encl 62(a) was non-appealable as it did not fall within the meaning of 'decision' pursuant to s 3 of the CJA. In a nutshell it was an interlocutory decision. That decision had not finally disposed of the rights of the respondent. Learned counsel for the applicant then alluded to the run of the mill cases which dealt with failed appeals and interlocutory appeals dealt with by courts.

[8] There was a slight lapse of memory when learned counsel for the applicant veered onto the merits of the case, ventilating that the respondent was never deprived of any opportunity to question PW25, as he did give evidence and had been confronted with the Suhakam report during the trial proper. With the objection raised by the respondent, as the matter before us should be dealt with only on technicalities, no further facts were adduced by the applicant.

[9] The respondent took a rather novel route to counter encl 3(a) by submitting that the issue in encl 62(a) originated from the Court of Appeal,

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unlike the run of the mill cases where the subject matter originated from the High Court. In support of his argument the respondent argued that the relevant provision for our consideration was s 87 of the CJA; a provision that was not alluded to by the applicant at the outset. The respondent argued that emphasis should be on the words 'in respect of any criminal matter decided by the High Court in its original jurisdiction' as provided for under the latter provision. Section 87 of the CJA provides as follows:

> 87 Jurisdiction to hear and determine criminal appeals
>
> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the
>
> (2) ...
>
> (3) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[10] The respondent submitted that s 87 applies only to decisions of the Court of Appeal in respect of decisions from the High Court in its original jurisdiction ie of decisions which were ventilated and decided initially by it and subsequently determined by the Court of Appeal in its appellate jurisdiction. As encl 62(a) was decided for the first time in the Court of Appeal, the argument of the applicant that the decision here was non-appealable therefore could not stand. The respondent on the other hand graciously conceded that if we were to conclude that s 87 was applicable then the applicant's arguments must stand; this is so as the word 'decision' appears also in s 87. This is reflected in the respondent's written submission which reads as follows:

> Only in the event the said provision applies, would the restriction of what constitutes a 'decision' in s 3 of the CJA arise as the word 'decision' appears in the said s 87.

[11] The respondent thereupon submitted that as the applicant's application did not fall within the threshold of s 87 of the CJA encl 3(a) therefore ought to be dismissed.

[12] We held the view that as the respondent had taken the do or die route when relying totally on the inapplicability of s 87 of the CJA argument, and deliberately ignoring the cumulative prerequisites of *R v Parks* [1961] 3 All ER 633 and the requirements of s 61 of the CJA, the respondent must surrender itself to the applicant's legal argument in the event that solitary argument were to fail. We were not unaware that the collective requirements of *R v Parks* [1961] 3 All ER 633 had been adopted in Malaysia eg as applied in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 and *Murugayah v Public*

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Prosecutor [2004] 2 MLJ 545.

[13] It was incontrovertible that the Suhakam report was readily available by 23 April 2010 whilst the trial of the respondent at the High Court was after that date. In a word the additional evidence to be admitted was available during the trial. With some diligence and leg work PW25 could have been recalled to adduce additional evidence at the High Court.

[14] Section 61 requires a subjective deliberation of the Court of Appeal's mind, whether the additional evidence would be necessary, and thereafter decide whether such additional evidence would be taken down by itself or by the trial court. Necessary means that unless additional evidence is admitted, a miscarriage of justice would result or its reception is expedient in the interest of justice (*Khamis v Public Prosecutor* [1971] 2 MLJ 267; *Phung Geok Hoay lwn Pendakwa Raya* [2013] 3 MLJ 728).

[15] The issue of injustice could not have arisen here as the respondent had been acquitted at the High Court. Whether it was necessary or not that additional evidence be allowed by recalling PW25 was a matter of discretion to be exercised by the Court of Appeal. Here it was exercised but to the respondent's dissatisfaction.

THE BASIS OF OUR DECISION

[16] In summary, and a form of reiteration, the respondent had canvassed the argument that there could not be any other interpretation except that under s 87 of the CJA encl 62(a) must first have been decided by the High Court in its original jurisdiction, which meant that the High Court would have considered the matter in the first instance as opposed to its appellate jurisdiction over a matter heard in the first instance by a court below (*Janab's Key to Criminal Procedure Evidence Advocacy and Professional Ethics* p 46). Once that was undertaken then only could the Federal Court come into the picture, and that too after the Court of Appeal in its appellate jurisdiction, had dealt with that High Court's decision.

[17] Having alluded to the canon of construction we held the view that the matter before us did fall squarely under s 87 of the CJA hence entitling us to deliberate on the matter. We were satisfied that s 87 of the CJA was wide enough to include the matter before us ie the prayers in encl 3. The matter appealed against was criminal in nature, the decision to be dealt by us emanated from the Court of Appeal in its appellate jurisdiction, and the *matter* (not decision) was decided earlier by the High Court in its original jurisdiction. The respondent's preference to place emphasis on the words 'in respect of any criminal matter decided by the High Court in its original jurisdiction' rather

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A than reading s 87 as a whole, was inappropriate. This section speaks of *matter*, rather than decision, a word thus wide enough to include a striking out application.

B **[18]** The other relevant provisions that must be considered by us are ss 3, 50 and 51 of the CJA, with s 50 being the enabling provision empowering the Court of Appeal to hear and determine criminal appeals from the High Court and subordinate courts. Section 51 lays down the mode of appeal, the time factor to file the appeal, the substance of the appeal and the like. But both the provisions of ss 50 and 51 of the CJA speak of the word 'decision' and this is C where s 3 of the CJA becomes relevant. Under s 3 is legislated the definition of 'decision', and it reads:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not fully dispose of the rights of parties.

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[19] With s 87 of the CJA being applicable, regardless of the earlier concession made by the respondent, we agree with the applicant that the denial by the Court of Appeal to recall PW25 to adduce further evidence was not a E final order within the context of s 3 of the CJA.

CONCLUSION

[20] For reasons stated above, we decided that the appeal filed against the F ruling of the Court of Appeal disallowing the prayers of encl 62(a) incompetent, and thus non-appealable. Enclosure 3(a) was thus allowed followed by the consequential order that the interlocutory appeal of the respondent be struck out in limine.

G *Order accordingly.*

Reported by Kanesh Sundrum

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